

VOLUNTEER PROTECTION ACT OF 1997 - AN IMPERFECT SOLUTION

by

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On June 18, 1997, the "Volunteer Protection Act of 1997" was enacted into law by the United States Congress (111 Stat. 218). The purpose of the Act is to limit lawsuits against volunteers serving nonprofit public and private organizations and governmental agencies. The Act was enacted in response to the withdrawal of volunteers from service to nonprofit organizations because of concerns about possible liability. By limiting lawsuits against such volunteers, it was thought that the number of volunteers would increase, thus promoting the ability of nonprofit organizations and governmental entities to provide services at a reasonable cost. This is certainly an admirable purpose, and one with which the Nonprofit Corporations Committee of the State Bar of California Business Law Section has been concerned since 1987.

Unfortunately, the Volunteer Protection Act has not achieved this goal. In fact, a reading of the Act makes it clear that it may have created more potential problems, both for the volunteer and the nonprofit organization, than it has solved.

I. What Does the Act Provide?

A. In General. The Act generally provides that, if a volunteer meets certain criteria, he or she has a complete defense to an action and has no liability. Even when volunteer does not meet the criteria, he or she may still have some protection against awards of non-economic and punitive damages, as long as the volunteer has not engaged in specific types of prohibited conduct. However, the Act does not prohibit lawsuits against volunteers, at best, it provides a defense for the volunteer to raid, if and when he or she is sued.

Unfortunately, any statutory scheme which merely "tailors" liability will not decrease lawsuits. Only to the degree that a statute prohibits suits against volunteers and transfers all liability for the volunteer's conduct to the organization, will lawsuits against volunteers be avoided. Even though the purpose of the statute is laudable and the statute may be helpful in some situations, as discussed below, much of the language is unclear. To the extent that the wording of the statute is ambiguous, pleading holes have been created which may insure that causes of action and defenses will be sustained past the demurrer stage, leaving volunteers at risk for significant legal fees, even if they ultimately prevail upon the merits once the facts have been sorted out.

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B. Preemptive Effect. The Act generally preempts the laws of any State. However, State law may provide additional protection from liability to the volunteers, or may remove the protection of the Act when all the parties to an action are citizens of the State. In other words, the Act applies to all volunteers unless State law provides more protection, or unless the State specifically eliminates the applicability of the Act to its citizens.

II. Who is a Volunteer?

A volunteer, for purposes of this Act is anyone who: (1) performs services (including officers, directors, trustees, and direct service volunteers); (2) for a nonprofit organization or governmental entity; and (3) either: (a) receives no compensation (although reasonable reimbursement for expenses incurred is allowed), or (b) does not receive anything of value in lieu of compensation, in excess of \$500 per year.

A nonprofit organization is defined as an organization exempt under section 501(c)(3) of the Internal Revenue Code or “any not-for-profit organization which is organized and conducted for public benefit and operated primarily for charitable, civic, educational, religious, welfare, or health purposes,” which does not practice any action which constitutes a hate crime.

The question of “compensation” is not always a bright line test, particularly where the volunteer receives incidental benefits, such as meals or childcare. For example, if an organization provides free meals (with a value of \$3.00) to its volunteers who are performing services, and a volunteer performs services (and is given these free meals) four days a week, 50 weeks out of the year, does this mean that the volunteer is no longer covered by the Act? What if the individual volunteers one day a week for 52 weeks, and is provided with free child care (value \$10.00 per day) during the time he/she is volunteering (which is necessary in order to allow the individual to volunteer)? Does this mean that the more an individual volunteers for an organization that provides incidental benefits, the less chance that individual will be covered by the Act? The Act does not provide answers to these questions.

III. When Does the Act Protect a Volunteer From Liability?

A. In General. Except as otherwise provided in the Act, a volunteer is not liable for harm if all of the following criteria are met:

1. The volunteer was “acting within the scope of the volunteer’s responsibilities” in the organization at the time of the act or omission. With many organizations, the scope of the volunteer’s responsibilities is undefined or is not clearly defined. The organization is often happy to get whatever help it can, whenever the volunteer is available. Sometimes the organization does not even know what the volunteer is doing or under what circumstances he/she is performing these services. Does the organization have to specifically authorize the volunteer to perform services before the Act will apply? If so, does the authorization have to come from the board of directors? From the President? From some other individual? What if the volunteer takes it upon himself/herself to perform some service on

behalf of the organization, will he/she be considered to be acting within the scope of the volunteer's responsibilities?

2. The volunteer is properly licensed, certified or authorized by the appropriate authorities of the State for the activities taken, if such is "appropriate or required." State licensing "requirements" are clear and easily definable. However, it is unclear what an "appropriate" license might mean. For example, several years ago, the California Supreme Court decided that licensing was not required for someone providing pastoral counseling in a church setting, but would it be found to be "appropriate" under this new law?

3. The volunteer is not guilty of willful or criminal misconduct, gross negligence, reckless misconduct, or "a conscious, flagrant indifference" to the rights or safety of the individual harmed. To include a volunteer in a lawsuit, a plaintiff needs only to plead indifference on the part of the volunteer to the rights or safety of the individual harmed. This could involve any volunteer performing services on behalf of an organization, even if the volunteer had no affirmative duty to look out for the safety of the individual, and even if the volunteer did nothing himself/herself, but only failed to take action. This "hole" is an example of why this law might be better termed, "The Lawyers' Full Employment Act." Because the Act only requires a pleading to state that an action or non-action was willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed, it will not prevent lawsuits against volunteers.

4. The harm was not caused by the operation of a vehicle, vessel or aircraft where the State requires an operator's license and insurance.

B. Exceptions. The Act does not apply to an action brought by the organization against the volunteer, nor does it limit the liability of the organization itself, to the extent it would otherwise be responsible for the act of the volunteer.

C. State Imposed Conditions. The state may impose the following additional conditions which will not be considered to be inconsistent with the Act:

1. The State may require an organization to "adhere to risk management procedures," including mandatory training of volunteers. Such regulations, if enacted by a State, are likely to result in expensive, time consuming, difficult to implement, and ineffective requirements that will have the net effect of discouraging individuals from volunteering, and also making it difficult, if not impossible, for many organizations to use volunteers. This is the exact opposite of the declared intention of the Act.

2. The State may make an organization liable for the acts or omissions of its volunteers to the same extent as an employer is liable for the acts or omissions of its employees. This scheme would be satisfactory if it were clear that the organization is to be held liable for the acts of the volunteer in place of the volunteer. However, for this to happen, the law must make it clear that, in exchange for holding the organization liable, the volunteer is absolved

of liability. Otherwise, this provision may simply add another defendant to the list, rather than substituting the organization for the volunteer. It is recommended that, if a state chooses to adopt this type of provision, the State allow the organization to elect to assume the liability to the extent that the volunteer is relieved from the same. It is further recommended that any such increased organizational liability be limited to acts of the volunteer within the scope of the volunteer's responsibilities.

3. The State may provide that there is no limitation of liability in actions brought by the State or a local government.

4. The state may require the limitation of liability to be contingent upon an organization providing a financially secure source of recovery, such as an insurance policy, to pay losses up to a specified amount. The organization must still make sure it has adequate insurance protection against any possible suits. However, where insurance is in effect, it makes most sense to relieve the volunteer of liability and let the organization defend the action on its own. Actions involving both volunteers and the organizations they serve, create the potential for a conflict of interest between the defendants, the need for special counsel, and multiplication of attorneys' fees and litigation costs. When a plaintiff names each member of the board of directors and the organization, simply paying first appearance fees for each defendant can be a big expense for a small nonprofit. We recommend that, in addition to the standard Directors and Officers Liability Insurance, the nonprofit organization has coverage for acts by other volunteers as well. It is extremely important that insurance policies are reviewed carefully and that the organization knows exactly what its policy covers and what it excludes. Since, under the Act, actions against volunteers will necessarily include a claim of some type of intentional or reckless conduct, it is important that these claims are not excluded!

If a volunteer meets the requirements set forth above, the volunteer is not personally liable and, if sued, is entitled to be dismissed from the action. If the volunteer does not meet the requirements, there is still a question of whether the Act provides a limitation on the type or amount of damages for which a volunteer is liable, provided the volunteer did not engage in specific types of prohibited conduct.

IV. What Conduct is Not Protected by the Act?

There are five specific situations in which the Act does not apply. These are where there is misconduct by the volunteer: (1) that constitutes a crime of violence or terrorism for which the defendant has been convicted, (2) that constitutes a hate crime, (3) that involves a sexual offense for which the defendant has been convicted, (4) where the defendant has been found to have violated a Federal or State civil rights law, or (5) where the defendant was under the influence of drugs or alcohol at the time of the misconduct.

Although, the excluded situations are unlikely to ever be found to be within the scope of the volunteer's responsibilities, it is helpful to have them listed, as they provide some guidance as to what conduct is not protected and to when a volunteer will be treated as any other defendant.

However, the statute again contains some ambiguity. For example, what does it mean that a “defendant has been found” to have violated a law? Further, what constitutes “under the influence?” A glass of wine with lunch or a cocktail at a reception? It should also be noted that a charge of harassment or discrimination is generally brought in the form of a civil rights violation. Because employment issues are the basis of most suits against the directors, the exclusion of this type of claim from coverage by the Act effectively excludes many if not most of the suits brought against the directors of a nonprofit, from coverage by the Act.

V. What Limitations on Liability Does the Act Provide?

If a volunteer is acting within the scope of the volunteer’s responsibilities to the organization but does not otherwise meet the criteria discussed above in section III, and none of the exclusions discussed above in section IV apply, the volunteer’s liability will be limited by the Act as follows:

A. Punitive Damages. Unless the injured party can establish, by clear and convincing evidence, that the harm was caused by the volunteer’s action, and that the action constituted willful or criminal misconduct, or a conscious flagrant indifference to the rights and safety of the individual harm, punitive damages may not be awarded against the volunteer.

B. Non-economic Damages. For any non-economic loss (losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of consortium, loss or injury to reputation, etc.), a volunteer covered by the Act will only be liable for these damages to the extent of his or her percentage of responsibility for the harm. To the degree that a volunteer is found to be at fault, “the court shall render a separate judgment” against that volunteer for the percentage of the loss for which the volunteer was responsible.

C. Economic Damages. The Act does not mention apportionment for economic losses. The assumption made in this Article is that, except to the degree the volunteer is protected from all liability as discussed in section III, above, all defendants will be jointly and severally liability for economic losses. However, the statute is ambiguous on this point and some litigant may question whether or not the Act permits recovery of economic damages at all.

VI. Conclusion. The intention of this law is laudable. However, the language of the Act is flawed, and is unlikely to provide significant protection for volunteers. It will not shield volunteers from the time, expense and aggravation of defending a lawsuit, even if the Act is ultimately found to bar a judgment. At its worst, the Act may create a guide map for pleading within the statutory exceptions and limitations in order to plead technically adequate causes of action or defenses, thus surviving possible legitimate challenges early in an action and embroiling volunteers in expensive and protracted litigation.